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No. 75-101

In the Supreme Court of the United States

OCTOBER TERM, 1975

ORLANDO JAMES VIGI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that evidence obtained from three court-authorized wire interceptions should have been suppressed because the intercept orders stated that the applications for the orders had been authorized by a specially designated Acting Assistant Attorney General when they actually had been authorized personally by the Attorney General. Petitioners also contend that there is a conflict among the circuits on this issue.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to conduct an illegal gambling business, in violation of 18 U.S.C. 371; all petitioners but Erdman were also convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners received the following sentences: Vigi—two years' imprisonment, all but six months of which was suspended, to be followed by three years' probation, and a $5,000 fine; Palmer and Flowery—one year's imprisonment, all but 60 days of which was suspended, to be followed by three years' probation, and a $1,000 fine; Pappas—three years' probation and a $2,000 fine; Kishner—three years' probation; and Erdman—three years' probation and a $1,000 fine. The court of appeals affirmed (Pet. App. B, pp. 24-31).

The undisputed evidence established that petitioner Vigi headed a large gambling operation in which the other petitioners participated as line sources, debt collectors or branch bookmakers. The business was shown to have conducted wagering operations on horse races and sporting events for a continuous period in excess of six months, with daily gross revenues occasionally exceeding $10,000. Much of the evidence presented at trial was gathered in the course of three periods of court-authorized wire interception. Although the orders under which the interceptions were conducted showed that the applications therefor had been authorized by a specially designated Acting Assistant Attorney General, the applications actually had been authorized personally by the Attorney General as well (Pet. App. B, pp. 25-26).

Petitioners contend (Pet. 4-6) that the evidence derived from these wire interceptions should have been suppressed under 18 U.S.C. 2518(10)(a)(ii) because the orders authorizing the interceptions were facially insufficient. The premise underlying this contention is that an Acting Assistant Attorney General does not possess the requisite statutory authority to authorize wire interception applications when specially designated to do so by the Attorney General, and that an intercept order identifying an Acting Assistant Attorney General as the person who authorized the application is therefore facially deficient. The deficiency, they claim, requires suppression of the evidence notwithstanding that the application was in fact authorized by the Attorney General.

We do not agree with petitioners' premise that an Acting Assistant Attorney General may not, when specially designated under 18 U.S.C. 2516(1), lawfully authorize an application for an intercept order. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122. But even assuming *arguendo* that the premise is correct and the court orders in this case were therefore facially insufficient within the meaning of Section 2518(10)(a)(ii), it does not follow that suppression is required. Since it is undisputed that the Attorney General actually authorized the application at issue here, it cannot be said that there was a "failure to satisfy

any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, 416 U.S. 505, 527. See also, *United States* v. *Acon*, 513 F.2d 513, 516-519 (C.A. 3); *United States* v. *Robertson*, 504 F.2d 289, 291-292 (C.A. 5), certiorari denied, No. 74-974 April 14, 1975. The court below thus correctly held (Pet. App. B, pp. 26-27) that the congressional intent behind the requirement that electronic surveillance applications be specially authorized "is satisfied when it is shown that the Attorney General of the United States is the person approving the authorization," and that suppression is not required "for every minor facial insufficiency."

Petitioners' contention that the instant case conflicts with *United States* v. *Robertson, supra, United States* v. *Acon, supra,* and *United States* v. *Pellicci, supra,* is incorrect. The courts in those cases held, as did the court below, that suppression was not required. *Robertson* did not discuss the question whether an Acting Assistant Attorney General could authorize wire interceptions. The court below, in harmony with *Robertson,* specifically held that it was unnecessary to reach the question because the actual authorization had been made by the Attorney General (Pet. App. B, p. 27). In *Acon,* two members of the court stated in *dictum* that an Acting Assistant Attorney General who had not been appointed by the President and confirmed by the Senate could not authorize intercept applications (513 F.2d at 516); the concurring judge agreed with the court in the instant case that it was unnecessary to reach the question (*id.* at 519). In *Pellicci* the court held that the Solicitor General, acting as Attorney General, had the power under 18 U.S.C. 2516(1) to designate specially an Assistant Attorney General to authorize wire interception applications (504 F.2d at 1106-1107). Thus there is no conflict among the circuits requiring resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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